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By. of Stenson

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BRIEF OF PLAINTIFF IN ERROR.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 725.

JOHN H. EVANS, AS RECEIVER, &c., PLAINTIFF IN ERROR,

vs.

ANDREW J. NELLIS, DEFENDANT IN ERROR.

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IN THE SUPREME COURT
OF THE UNITED STATES.

JOHN H. EVANS, as Receiver,
Plaintiff in Error,
vs.
ANDREW J. NELLIS,
Defendant in Error.
No. 278.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This case comes to this court on a certificate from the United States Court of Appeals for the Second Circuit. The statement of facts and questions of law arising thereon are as follows:

That the Inter-State Loan and Trust Company is a corporation created and organized under and by virtue of the general laws of the State of Kansas July 22, 1885, and as such was authorized to transact business as a land mortgage campany; that in or about the month of November, 1897, E. B. Crissey commenced an action against the said The Inter-State Loan and Trust Company in the United States Circuit Court for the District of Kansas, First Divi-

sion, to which court jurisdiction in that behalf duly appertained; that said action was duly commenced by the issue of a summons to the said company; that said summons was duly served upon the said company, and that said company duly appeared in said suit by attorney and defended the same, and that such proceedings were afterwards had in said action that on the 31st day of December, 1897, a judgment was duly given and made in and by said court in said action in favor of said plaintiff and against the said company, in and by which judgment it was decided, adjudged and decreed that there was due and owing to the plaintiff therein from and by the said company the sum of $6,792.20 and $56.45 costs, and that the plaintiff therein have and recover said sum from the said company, with interest thereon from said date at the rate of six per cent. per annum, and that the said plaintiff have execution therefor against the said company; that thereafter an execution against the property of the said The Inter-State Loan and Trust Company was duly issued out of the said court upon said judgment for the said sum of $6,792.20 and the costs as aforesaid, directed to the United States marshal for the district of Kansas, and that thereafter the said marshal duly returned said execution wholly unsatisfied, for the reason that no property, real or personal, belonging to said company could be found whereon to levy the same; that thereafter, and on or about the 9th day of June, 1898, upon the application of the said E. B. Crissey, the plaintiff herein was duly appointed receiver of the said The Inter-State Loan and Trust Company by the Circuit

Court of the United States for the District of Kansas, First Division, to which said court jurisdiction therein duly appertained, and has duly qualified and acted as such; that thereafter and on or about the 9th day of February, 1899, an order was duly given and made in and by said Circuit Court of the United States for the District of Kansas, First Division, by which order it was considered, adjudged, or dered and decreed that the said John H. Evans, as receiver, proceed against all or any of the stockholders of the Inter-State Loan and Trust Company, from whom, in his judgment, a recovery can be had to collect all of their liability as stockholders in said company, a copy of which order is hereto annexed and marked Exhibit A, and which copy the plaintiff herein prays may be considered as part of his complaint as if herein set forth in full; that the defendant is a citizen of the State of New York, and prior to the month of November, 1897, became a stockholder of said corporation and the owner of 602 shares of the capital stock thereof of the par value of $100 a share, and has ever since remained a stockholder and the owner of said shares. At the time when the defendant became a stockholder of said corporation, and from that time ever since, it was provided by the constitution of the State of Kansas (Sec. 2, Art. 12) as follows:

"Dues from corporations" (organized and existing under the laws of the State of Kansas) "shall be secured by individual liability of the stockholders to an additional amountequal to the stock owned by each stockholder, and such other means as shall be provided by law; but such in-

dividual liabilities shall not apply to railroad corporations nor corporations for religious or charitable purposes."

At the time the defendant became a stockholder of said corporation it was provided by the General Statutes of Kansas of 1868 (Secs. 32 and 44) as follows:

"SEC. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

"SEC. 44. If any corporation, created under this or any general statute of this State, except railway, or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from the property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided

equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

By a law of Kansas enacted January 11, 1899, sections 32 and 44 aforesaid were repealed, and by sections 14 and 15 it was provided as follows:

"Sec. 14. That section 32, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows:

Sec. 22. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent, and upon application to the court from which such execution was issued, or to the judge thereof, a receiver shall be appointed to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct. Should the collections made by the receiver exceed the amount necessary to pay all claims against such corporation, together with all costs and expenses of the receivership, the remainder shall be distributed among the stockholders from whom collections have been made, as the court may direct; and in the event any stockholder has not paid the amount due from him the stockholders making payment shall be entitled to an assignment of any judgment or judgments obtained by the receiver against such stockholder, and may enforce the same to the extent of his proportion of claims paid by them."

"Sec. 15. That section 46, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows:

Sec 46. The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and in addition thereto for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors."

The present action was brought in the Circuit Court of the United States for the Northern District of New York by the receiver of the said The Inter-State Loan and Trust Company, appointed as aforesaid, against the defendant to recover the sum of $60,200, alleging his liability as a stockholder and the owner of the said 602 shares of the said corporation.

Upon the foregoing facts this court desires instructions upon the following questions:

QUESTIONS OF LAW.

1st. Are sections 14 and 15 of the Laws of Kansas of 1899 valid legislation in view of the provision of the constitution of the State of Kansas respecting the individual liability of the stockholders of corporations, or are they invalid as subjecting such stockholders to liabilities other than "dues from corporations"?

2d. Do sections 14 and 15 aforesaid contravene the constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the State of Kansas?

3d. Is the plaintiff, as a receiver appointed as aforesaid, entitled to maintain an action in the Circuit Court of the United States for the Northern District of New York?

In accordance with the provisions of section 6 of the act of March 31, 1891, establishing courts of appeal, etc., the foregoing questions of law are by the Circuit Court of Appeals for the Second Circuit hereby certified to the Supreme Court.

Specification of Errors Relied Upon.

1. The learned trial court erred in holding that sections 14 and 15 of the act of January 11, 1899, of the State of Kansas contravened the constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of the Inter-State Loan and Trust Company by subjecting him to liabilities other than "dues from corporations."

2. The trial court erred in holding that sections 14 and 15 aforesaid contravened the constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a Kansas corporation.

3. The trial court erred in holding that plaintiff, as the receiver of a Kansas corporation, appointed by a Kansas court, was not entitled to maintain the action in the Circuit Court of the United States for the Northern District of New York.

Question I.

We are in some doubt as to the meaning of the first question propounded by the court. Under the law as it existed prior to the passage of the act of January 11, 1899, stockholders in Kansas corporations were liable to the creditors thereof in an amount equal to the amount of stock held by each, together with any amount unpaid thereon, and this liability was collected by the creditor proceeding directly against the stockholder in an action at law.

Whitman v. Bank, 176 U. S. 559;
44 L. Ed. 591;
Abbey v. Dry Goods Co., 44 Kan, 415.

By the act under which this action was commenced, receivers of defunct corporations are authorized to collect this liability and distribute the same among all the creditors. The Inter-State Loan and Trust Co. was incorporated and a receiver was appointed therefor and defendant became a stockholder therein before the passage of the act of January 11, 1899.

It would seem that, by the first question propounded by the court, it is sought to inquire whether the rights of the stockholder are being impaired and his liability increased because, possibly, the money which may be recovered from him will be applied in whole or in part to the expenses of the receivership; or, it might be applied in whole or in part to the payment of claims against the receiver which are not "dues from corporations" within the meaning of section 2 of article 12 of the constitution of the State of Kansas. While, as stated, we are in some doubt as to the meaning

of this first question, we are led to believe that this is the meaning from the following paragraph in the opinion of the trial court:

"It is not difficult to suppose a case where a stockholder absolutely safe under the former act may be financially ruined under the present act. For instance, where a stockholder was sued for, say, $10,000 by the only judgment creditor. If the judgment creditor owed the stockholder the sum of $10,000 it is manifest that he could not recover. Or, assume a situation where the entire amount recovered is consumed in paying the expenses of the receivership. In the first of these instances the receiver takes money which could not be collected under the former act; in the second he applies the money collected to the payment of obligations which are created for the first time by the act of 1899, and which are not "dues from corporations." (Ward v. Joslin, [C. C.] 100 Fed. 676.) It is true that under the prior statute in certain circumstances an equal amount might be recovered, but the stockholder might discharge his entire obligation by paying much less than the full amount. Under the present law his liability is increased by compelling him to pay the full amount and by applying it in payment of an entirely new class of obligations."

Evans v. Nellis, 101 Fed. Rep. 920, *925*.

If this is the true meaning of the first question propounded by the court, we think the answer depends so largely upon the same considerations which must determine the answer to the second question that it is hardly practical to separate its full discussion from the discussion of the second question. We will therefore state briefly the reasons why we believe the first question should be answered in the negative, leaving the full discussion of such

reasons, with the authorities to support the same, to be stated under the discussion of the second question.

The first question should be answered in the negative—

(*a*) Because under the old law a stockholder was liable to the full amount of his stock for the debts of the corporation.

(*b*) He cannot possibly be injured by being compelled to pay the sum for which he was liable under the old law to the representative of all the creditors instead of paying the same direct to some individual creditor.

(*c*) If the liabilities of the Inter-State Loan and Trust Company are less than his liability as a stockholder, and he would thereby under the old law have been liable for a less sum than is herein sued for, this is a question of fact; and where the constitutionality of an act turns on a question of fact the burden rests upon the party relying upon the unconstitutionality to affirmatively show the fact, and no such showing exists in this case.

Wellington, *Petitioner*, 16 Pick. (Mass.) 87, *95 to 97*;
Jones v. Black, 84 Ala. 540, *543*;
Franklin County v. State, 24 Fla. 55;
Stevens v. Stevens, 20 Ky. (4 T. B. Monroe) 526;
Saroney v. Burrow, 17 Fed. Rep. 591;
In re Stecknoth, 7 N. W. Rep. 223;
Craig v. Church, 88 Pa. St. 42.

(*d*) If there are any claims against John H. Evans, as receiver, which are not "dues" within the meaning of the constitution of Kansas, and to the payment of which in part the money recovered in this action might be applied, and if such fact is significant in determining the rights of

the stockholder, then the burden of proof rests upon the stockholder to affirmatively show such fact; and there is no such showing in this case. See cases last above cited.

(*e*) If a recovery in this case should be limited to the actual ascertained indebtedness of the Inter-State Loan and Trust Company, for which the stockholder would have been liable under the old law, (as it was suggested in the court below that the recovery might be limited, Evans v. Nellis, 101 Fed. Rep. 920, *927*), the stockholder cannot possibly be injured even though a portion of the money might be used to pay the expenses of the receivership. His liability is not thereby augmented to any extent, nor is the recovery increased.

(*f*) If one resists the payment of a just demand, he is always liable for the payment of certain costs and expenses incident to the recovery of such just demand, and he cannot complain that such charge thereby increases his liability in some measure. Nellis might voluntarily have paid the just debts of the corporation to the amount of his liability, and thereby have relieved himself from any possible charge for costs and expenses.

Bank v. Milling Co. 59 Kan. 654.

(*g*) One who is not injured by the alleged unconstitutionality of an act cannot raise the question of its validity. (See authorities cited under discussion of the second question.) And if the recovery in this case is limited to the amount for which Nellis would have been liable under the old law, he is not injured.

(*h*) An act unconstitutional in part should be enforced as far as possible.

Keokuk Co. v. City of Keokuk, 95 U. S. 80.

Question II.

(A) Does the act of January 11, 1899, violate that provision of section 10, article 1, of the constitution of the United States, prohibiting the States from passing any law "impairing the obligation of contract?"

(B) If the act in question does so violate the constitution of the United States, is the defendant in a position to raise this question?

A.

It has been held by the Supreme Court of Kansas that an act similar to the one in question which changed or attempted to change the manner of collecting the stockholder's liability from a proceeding brought by the individual creditor to one maintained by the receiver on behalf of all the creditors of banking corporations, was invalid as to the creditors of the bank under the provision of the constitution of the United States referred to. (Woodworth v. Bowles, 61 Kan. 569.) And it was upon the authority of this case largely that the learned trial court held the act in question to be unconstitutional.

Evans v. Nellis, 101 Fed. Rep. 920, 925.

As this question, however, arises under the constitution of the United States, and not under or as an interpretation of the constitution or statutes of the State of Kansas, this court and not the Supreme Court of Kansas is the final au-

thority on this question. The opinion in Woodworth v. Bowles, 61 Kan. 569, is entitled to such consideration only as its intrinsic merit as an authority may command. It is in no wise binding.

A Case Directly in Point.

We think the case of Hill v. The Merchants Mutual Insurance Co., 134 U. S. 515, is directly in point as sustaining the validity of the act of January 11, 1899.

On March 3, 1857, the legislature of Missouri incorporated the Washington Insurance Company, and provided that it should be exempt from the operations of the general corporation laws of Missouri. On February 9, 1859, the legislature of the same State incorporated the Excelsior Insurance Company, and provided that it should have the same rights, privileges and restrictions as were conferred upon the Washington Insurance Company. By reason of its being exempt from the general corporation laws, it left the unpaid subscription to the corporation without any specific remedy provided for the collection of the same. The defendant, Hill, subscribed for sixty-four shares of the capital stock of the Excelsior Insurance Company, of the par value of $100 per share, leaving $4,800 unpaid on the stock. Subsequently, and in 1879, the legislature of Missouri passed an act concerning the collection of the stockholders' liability, almost identical with section 32 of the Kansas law as such law existed prior to the passage of the act of January 11, 1899. Subsequently a creditor moved for execution under this section against Hill. The execu-

tion was ordered and appeal taken to the Supreme Court of Missouri (86 Mo. 466), and being there affirmed was taken to the Supreme Court of the United States and again affirmed in the case above cited.

The court holds that under the law as it existed in Missouri as applied to the Excelsior Insurance Company at the time of its incorporation, the only method of collecting the unpaid subscription was by bill in equity.

"The result of this construction of the charter of the insurance company is, that prior to the passage of the act of 1866, which took effect March 19, 1866, no specific remedy was prescribed for the creditor seeking to reach the unpaid subscription of stockholders. But it was open to them to proceed by bill in equity."

The court will thus observe that the change in this case was from a remedy on behalf of all the creditors to one running to each individual creditor; whereas in the case at bar, the change is from a remedy to the individual creditors to one running to all the creditors; but this does not affect the principle involved. The court affirmed the Supreme Court of Missouri, and says, among other things:

"But neither the company nor its stockholders had any vested right in that particular remedy. They could only insist that the extent of their liability should not be increased."

And again the court says:

"The statute of 1879 did not enlarge this liability . . . . . While under the original charter of the company he was liable to a suit in equity, under the statute of 1879 he was liable to be proceeded against by a notice and motion in the action in which judgment was rendered against

the corporation. In either mode he had opportunity to make defense."

And again the court says:

"It was entirely competent for the legislature, as a regulation of the business and affairs of the company, to give its creditors a new or additional remedy by which this undertaking could be enforced in their behalf, not increasing the debtor's liability."

This is the whole case in a nutshell. In this connection it is important to note that the constitution of Kansas, article 12, section 1, being the section immediately preceding the one creating the liability sought to be enforced, provides:

"Corporations may be created under general laws, but all such laws may be amended or repealed."

The court below seemed to assume that this case would be controlling if the liability of the defendant had not been increased, (Evans v. Nellis, 101 Fed. Rep. 926, 927), but, as we shall see hereafter, if there has been any increase of the liability of defendant by the act in question, it is not sought to recover such increase, and the defendant remains uninjured.

The Legislature May Properly Add the Receiver to the Persons Authorized to Sue.

But it is not necessary in this case to overturn the doctrine of the case of Woodworth v. Bowles, 61 Kans. 569, in order to sustain the validity of the act in question as between the receiver and the stockholder. The rights of creditors were directly drawn in question in the case of

Woodworth v. Bowles. The creditors were asserting their rights under the constitution of the United States. No creditor is here asserting any rights. On the contrary, it appears that the only creditor that the record discloses caused this receiver to be appointed, and this method of collection to be pursued. Now, assuming that all of the rights of the individual creditors of the Inter-State Loan and Trust Company remain as they existed prior to the act in question, it is still entirely consistent with such rights for the legislature to add to the list of persons authorized to sue for this liability, the representative of all the creditors. No individual creditor had any vested right to the liability of the stockholder; he had the right of diligence only. His right only became vested after he had commenced an action against the stockholders. Now, if he chooses to neglect these rights, if he elects to be dilitory, if he takes no steps to convert his contingent right into a vested one, is even he injured by permitting the receiver to sue and collect the liability, provided the receiver is diligent and actually commences his suit before any individual creditor has commenced?

"The judgment creditor of an insolvent corporation who first moves in conformity with paragraph 32, chapter 23, General Statutes of 1889, to charge a stockholder of the corporation on his liability under the statute, acquires a priority of right to recover against such stockholders, with which a creditor subsequently moving cannot rightly interfere."

Wells v. Robb, 43 Kan. 201.

Now, can it be said that this contingent right of each

individual creditor is so substantial that it has been impaired under the constitution of the United States in a case where a receiver representing all of the creditors has actually commenced his action before the individual creditors began theirs? There is no claim or contention in this case that any individual creditor has sued the defendant. The rights of the individual creditor were so intangible under the old law that a stockholder might pay voluntarily to another creditor after he had been sued, but before summons were served upon him, although he had full knowledge of the pendency of the suit, and thereby defeat a recovery in the pending action. (Munson v. Warren 65 Pac. [Kan.] 222.) Suppose the act in question had merely authorized the receiver to sue in case the individual creditors failed to do so, and had preserved in form all of the rights of the creditors under the old law, and then, suppose that this action had been commenced by the diligent receiver before the dilitory creditors had commenced, would there be any serious question about the validity of the law?

B.

The Stockholder Cannot Complain.

But let us take a step further. Let us assume, for the sake of the discussion, that Woodworth v. Bowles was correctly decided. Let us assume further that the legislature had no power to authorize the receiver to sue, even where the individual creditors neglected to sue, and so assuming,

let us inquire if the stockholder is in a position to raise any of these questions.

The following are a few extracts from the leading authorities, showing that only those who are injured by an act can raise the question of its constitutionality:

"Nor will the court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it."

Cooley's Const. Lim. (6th Ed.) 196.

"It is only when some person attempts to resist the operation of the act and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. (Wellington, Petitioner, 16 Pick. 98. *A legislative act may be entirely valid as to some classes of cases and clearly void as to others.*"

People v. C. I. R. R., 89 N. Y. 75, *93*.

"Again, we are told that the funding act is void, because it impairs the obligation of the contract made by the State with the holders of the coupons for interest, under the act of April 25, 1867. It is enough to say that no such question arises in these cases. No holder of those coupons, if indeed any such holder now exists, (which is at least doubtful), is here complaining that he is injured in any way by the funding act; and it is well settled that the courts will never pronounce a statute unconstitutional because it may impair the rights of others not complaining. The statute is assumed to be valid until some one complains whose rights it invades."

Antoni v. Wright, 22 Gratt. (Va.) 833, *857*.

"Only those whose rights would be prejudiced by the enforcement of an unconstitutional act will be heard to question its validity."

6 Am. & Eng. Enc. L., (2d. ed.) 1090.

"A law unconstitutional because it impairs the obligation of contract is only null so far as the rights of those persons are concerned the obligations of whose contracts are thereby impaired. As to all other rights and all other persons, it is entitled to full force and effect." (Syllabus, p. 727.)

"Only a person having a right and interest to invoke the unconstitutionality of a law as affecting himself, his property and his rights, can present such a defense."

Moore v. The City of New Orleans, 32 La. Ann. 725, 746.

"One cannot be heard to say a law is invalid and unconstitutional upon a ground which in no way affects his rights. One who seeks to obtain the privilege of selling liquor as a beverage cannot question the constitutionality of the law which denies him that privilege upon the ground that it forbids the sale of liquors even for religious or medicinal purposes, as prescriptions are not filled in a bar room, nor the communion table supplied from such places." Par. 5, Syllabus, p. 424.)

Burnside v. Lincoln County Court, 86 Ky. 423.

"A party must be prejudiced by the enforcement of a statute or the courts will not listen to his objections to its constitutionality." (Par. 5, Syllabus, p. 682.)

Marshall v. Donovan, 73 Ky. 681, *691*.

NOTE: In this case the legislature of Kentucky passed a law authorizing taxation for school purposes, but excluded citizens of African descent from the operations of the law and the benefits of the school provided for. A white man resisted the levy of the tax on the ground that the law was unconstitutional as being a discrimination against the blacks, and in the opinion the court says: "It is sufficient in this case that the negro is asserting no such claims, and that the appellant, who belongs to the favored

race or class, cannot raise the question as to the constitutionality of the manner in which the school fund and the moneys raised by taxation for school purposes are expended or distributed."

"A white person indicted by a grand jury composed wholly of persons of the white race cannot complain because negroes were excluded by statute from the jury. Only those who are prejudiced by an unconstitutional law can complain of it." (Syllabus.)

Commonwealth v. Wright, 79 Ky. 22.

"Not only is it true that a court will not, as a general rule, pass upon a constitutional question and decide a statute to be invalid unless a decision upon that very point becomes necessary, but it is also a rule that a court will not listen to an objection made to the constitutionalty of a statute by a party whose rights it does not affect, and who has, therefore, no interest in defeating it. (Cooley Const. Lim., 5th Ed., 197.) A party who seeks to have an act of the legislature declared unconstitutional must, says the Supreme Court of Alabama, in Jones *et al.* v. Black *et al.*, 48 Ala. 540, not only show that he is or will be injured by it, but he must also show how and in what respect he is or will be injured and prejudiced by it. Injury will not be assumed; it must be shown."

Com. Franklin Co. v. State, 24 Fla. 54.

NOTE.—In this case certain election officers resisted the performance of certain duties imposed by statute, on the ground that the statute was repugnant to the state constitution.

"Where the rights of citizens have been invaded by any unwarrantable, arbitrary exercise of the legislative power, it is the duty of this court to afford the needed redress and to declare the act a nullity. But at whose instance shall this be done? Plainly those whose rights are injuriously

affected by the act complained of, their representatives or assigns, and *they only* can call upon the court to do this."

Williamson v. Carleson, 51 Me. 449, *453*.

NOTE.—The words "*they only*" are italicised in the opinion.

"The legislature has power to pass an act providing that a turnpike shall be laid out as a highway, and that the supreme judicial court shall appoint commissioners to estimate and award the amount to be paid to the turnpike company as damages for taking their property, and also to determine and decree in what proportion this amount shall be paid by the counties in which the turnpike lies; and such counties cannot object to the constitutionality of such act on grounds which affect merely abutters or towns, nor call in question the decision of the legislature as to how much property of the company is necessary for the public use." (Syllabus.)

Hingam v. County of Norfolk, 6 Allen (Mass.), 353.

"It may be well doubted whether a formal act of legislature can ever with strict legal propriety be said to be void; it seems more consistent with the nature of the subject and the principles applicable to analagous cases to treat it as voidable. But whether or not the case can be imagined in which an act of the legislature can be deemed absolutely void, we think it quite clear that when such act is alleged to be void on the ground that it exceeds the just limits of legislative power, and thus injuriously affects the rights of others, it is to be deemed void only in respect to those particulars and as against those persons whose rights are thus affected. *Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, there-

fore, concurs with well established principles of law in the conclusion that such act is not void, but voidable only; and it follows as a necessary legal inference from this position that this ground of avoidance can be taken advantage of by those only who have the right to question the validity of the act, and not by strangers. To this extent only is it necessary to go in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power; and to this extent only, therefore, are courts of justice called on to interpose.

"Besides, and this is only argument tending to the same result, if the legislative act may or may not be valid according to circumstances, courts are bound by the plainest principles of exposition, as well as by the just deference to the legislature, to presume the existence of those circumstances which will support it and give it validity. For instance, if an act of the legislature appears on the face of it to be an encroachment on the rights of any persons, but would nevertheless be valid if passed with the consent of those persons, the court is bound to presume that such consent was given. And this presumption must prevail in favor of the validity of the act until the contrary is shown, and shown too by the person having an interest in the maintenance of the rights supposed to be thus injuriously affected, and having the right to call for the interposition of the court for their support and protection; and a stranger can have no right to appear and contest the validity of the act upon such ground." Wellington, Petitioner, 16 Pick. (Mass.) 87, *95–97*.

"An act of assembly provided for the consolidation of the city of Pittsburg and surrounding territory into one city; to be submitted to a vote of the citizens in three designated districts, and if either district decided in favor of consolidation an election was to be held for municipal officers, but if either district should reject consolidation such district should have no representation. *Held*, that

the submission of the question to a vote was not unconstitutional."

"If the act be unconstitutional, private parties cannot interfere by bill to have it so declared, unless on account of some damage to them. Injury to the public peace or interests in the territory to be incorporated is not sufficient." (Syllabus.)

Smith v. McCarthy, 56 Pa. St. 359.

"It is an approved rule that no one can take advantage of the unconstitutionality of an act who has no interest in and is not affected by it." (Syllabus.)

State v. Snow, 3 R. I. 64.

"No one but the party or the person claiming under him whose right is affected by the act of the legislature can plead its unconstitutionality."

De Jarnett v. Haynes, 23 Miss. 600, *603.*

"An act apportioning school funds to a school at which tuition fees are charged for pupils able to pay, should not be declared unconstitutional on the return of the commissioner to an application requiring him to pay out such funds, (1) because such a ruling is not necessary to the determination of the case, and (2) because, no individual rights of the school commissioner being involved, it does not seem that he should be permitted to question the constitutionality of an act of the legislature directing his official action." (Syllabus.)

Ex-parte Florence School, 43 S. C. 11.

"Courts do not lend ear to objections urged against the constitutionality of a statute by parties whose rights are not affected, and who therefore possess no interest in having the court pronounce upon the question."

Smith v. Inge, 80 Ala. 283, *286.*

"A party who seeks to have an act of the legislature declared unconstitutional must not only show that he is, or will be injured by it, but he must also show how and in

what respect he is or will be injured and prejudiced by it. Injury will not be presumed; it must be shown."

Jones v. Black, 48 Ala. 540, *543*.

"Only the person whose rights are affected and who has some right and interest in the defeat of an act can raise a question as to its unconstitutionality."

Airy v. People, 21 Colo. 144.

"One cannot be heard to complain that a statute which discriminates between classes of persons in the imposition of burdens of municipal control and taxation is unconstitutional as being a denial of the equal protection of the laws, unless he belongs to one of the classes discriminated against."

Kansas City v. Union Pac. R. R., 59 Kan. 427;
Affirmed by this court, 176 U. S. 114.

"One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity."

Red River Valley Nat'l Bank v. Craig, 181 U. S. 548, *558*.

"A voter who does not allege that he ever was registered or ever made any application to be registered, but who, so far as appears, may have been entitled to apply for registration, is not in a position to impugn the constitutionality of a statute for registration on the ground that it in effect required a longer residence in the country than was required by the constitution of the State, and otherwise unreasonably impeded the exercise of the constitutional right of voting."

Wiley v. Sinkler, 179 U. S. 58.
Duer v. Small, 4 Blatchf. 263;
Reid v. Town of Matonton, 80 Ga. 755;
Farneman v. Mt. Pleasant Cem. Asso., 135 Ind. 344, *347*.
Small v. Hodgen. 11 Ky. 16;
Stevens v. Stevens, 20 Ky. (4 T. B. Monroe), 626;
Eakins v. Eakins, 2 S. W. Rep. 285;

McKinney v. State; 3 Wyo. 319;
16 L. R. A. 710;
Louisville S. V. & T. Co. v. Louisville & N. R. Co.,
92 Ky. 233;
14 L. R. A. 579;
Prince v. Croker, 166 Mass. 347;
32 L. R. A. 610;
Town of Pierrefont v. Loveless, 72 N. Y. 211.

Will the Defendant be Injured by the Maintenance of This Action?

It is contended by the defendant that he would be injured because section 14 authorizes a recovery to the full amount of his stock liability, whereas under the old law he would only be liable for the actual amount of the indebtedness of the corporation, and, further, because a portion of the money herein recovered might be applied to the payment of the costs and expenses of the receivership, or to the payment of some liability of the Inter-State Loan and Trust Company not comprehended within the term "dues" in section 2, article 12, of the constitution of the State of Kansas; and further, because he might have defenses against actions brought by individual creditors that would not be available in this action.

In reply we say:

(a) That where the constitutionality of an act as to a particular case turns on a question of fact, the burden rests upon the one who avers the unconstitutionality to prove the fact. Every presumption of fact in the absence of proof will be in favor of the constitutionality of the act.

(b) Assuming that the facts exist which would render the act unconstitutional in so far as it attempts to authorize a recovery to the full amount of the stock liability of the defendant, there can still be no constitutional impediment to a recovery to such amount as the record affirmatively shows the defendant to have been liable for under the old law, because—

(c) The act of January 11, 1899, does not require the receiver to collect the full amount from each, although it does authorize such collection; and because—

(d) An act unconstitutional in part should be enforced as far as possible.

(a) **Burden of Proof Upon the Stockholder.**

This action was brought by the receiver to recover the full amount of the stock liability of the defendant, $60,200. The record does not affirmatively show what the liabilities of the Inter-State Loan and Trust Company were. The record in this court shows affirmatively only $6,722.20, with interest and certain costs. The record in the Court of Appeals showed affirmatively liabilities to the amount of $16,000. (Evans v. Nellis, 101 Fed. Rep. 920, 927.) But the amount is wholly immaterial for the purpose of determining the questions of law involved.

In the court below, it was practically conceded upon the oral argument that the recovery against the defendant might be limited to such amount as the record affirmatively showed was the indebtedness of the Inter-State Loan and Trust Company. (Evans v. Nellis, 101 Fed. Rep. 920, 927.)

This concession was, however, too liberal to the defendant; was not necessary under the law, and is now withdrawn, for the reason that the burden of proof rests upon the stockholder, he being the one who avers the unconstitutionality of the act, to show affirmatively this and all other facts which he relies upon to show that he is injured, and that therefore the act is invalid as to him in this case.

"If the legislative acts may or may not be valid according to circumstances, courts are bound by the plainest principles of exposition, as well as by the just deference to the legislature, to presume the existence of those circumstances which will support it and give it validity. For instance, if an act of the legislature appears on the face of it to be an encroachment on the rights of any persons, but would nevertheless be valid if passed with the consent of those persons, the court is bound to presume that such consent was given. And this presumption must prevail in favor of the validity of the act until the contrary is shown, and shown too by the persons having an interest in the maintenance of the rights supposed to be injuriously affected and having a right to call for the interposition of the court for their support and protection."

Wellington, Petitioner, 16 Pick. (Mass.) 87, *95–97*.

This is an exhaustive and well-considered opinion by the famous Chief Justice Shaw, of Massachusetts. Jeremiah Mason appeared in opposition to the constitutionality of the act therein questioned.

"A party who seeks to have an act of the legislature declared unconstitutional must not only show that he is or will be injured by it, but he must also show how and in what respect he is or will be injured or prejudiced by it. Injury will not be presumed, it must be shown."

Jones v. Black, 48 Ala. 540, *543*.

"A party who seeks to have an act of the legislature declared unconstitutional must, says the Supreme Court of Alabama in Jones *et al.* v. Black *et al.*, 48 Ala. 540, not only show that he is or will be injured by it, but he must also show how and in what respect he is or will be injured or prejudiced by it. Injury will not be assumed; it must be shown."

Franklin Co. v. State, 24 Fla. 55.

"It lies on the party asserting it [the unconstitutionality of an act] to aver and show it."

Stevens v. Stevens, 20 Ky. (4 T. B. Monroe) 526.

Further, to the same effect, see—

Saroney v. Burrow, 17 Feb. Rep. 591;
In re Stecknoth, 7 N. W. Rep. 223;
Craig v. Church, 88 Pa. St. 42'

The court will presume for the purpose of sustaining the constitutionality of the act that the liabilities of the Inter-State Loan & Trust Company were equal to the amount of the stock liability of the defendant.

This same rule of law disposes of each and all of the other objections of the stockholder as above outlined. He objects that a portion of this money might hereafter be used to pay the costs and expenses of the receivership. If such use would be illegal under the circumstances, we are bound to presume that the court, where the receivership is pending, will follow the law, and will order the distribution of the money according to law. Can an act of the legislature be said to be unconstitutional because we are bound to presume that some court will hereafter disregard the law?

The stockholder objects to the maintenance of this

action because he says some portion of the money which is recovered might be applied to the payment of liabilities for which he would not be liable at the suit of an individual creditor. In the first place there could be no such liabilities. In the second place, if there could, the burden rests upon the stockholder to show affirmatively that there are, in fact, such liabilities. And even when such showing has been made there can be no presumption that the court would use any portion of this money to pay such liabilities contrary to law.

The defendant further objects because he says he might have defenses if sued by the individual creditor. The learned trial court seemed to lay considerable emphasis on this point, (Evans v. Nellis, 101 Fed. Rep. 920, *925*). But again we find a complete answer to this suggestion in the rule now under discussion, that where the unconstitutionality of an act in a certain case as to a certain person depends upon a question of fact, the burden of proof rests upon the one averring the unconstitutionality to show the fact, and there is no showing that the defendant had any defense when sued by any or all of the individual creditors of the company. Acts of the legislature cannot be declared invalid upon conjectures, upon hypothetical cases, or upon presumptions of fact; the fact must be averred and proven.

(b) No Constitutional Impediment to a Partial Recovery.

But assuming, for the sake of discussion, that we must presume the liabilities of the Inter-State Loan & Trust Company, for which the defendant was liable under the old law, to be limited to such sums as the record affirmatively shows them to be, what possible constitutional impediment can there be to a recovery of such sum as the defendant was concededly liable for under the old law?

We propounded the following question to the learned trial court, upon the theory of a partial recovery, and upon the theory that the liabilities of the company were such only as affirmatively appeared by the record:

"What difference does it make to the defendant whether he pays $16,000 to the plaintiff, or to the individual creditors of the Inter-State Loan & Trust Company?"

And the court answered the question as follows:

"None. But it makes a difference of $44,200 whether judgment is entered under the old law or under the new, and this is the proper test to apply when considering the question of the defendant's liabilities."

Evans v. Nellis, 101 Fed. Rep. 920, *927*.

We respectfully submit the answer of the learned trial court was wholly fallacious and was no answer at all. If judgment is entered under the new law for $16,000, the identical sum for which the defendant was liable under the old law, he is not injured by the sum of $44,200, nor any other sum. The fundamental error of the trial court was in assuming that judgment could not be entered for $16,-

000 when an action was brought for $60,200 under a statute which attempted to authorize such recovery.

(c) The Act of January 11, 1899, Does Not Compel a Full Recovery.

The trial court seemed to have proceeded upon the theory that the receiver had no power under the act of January 11, 1899, to recover less than the full amount of the stock liability. This is certainly a strange and unusual construction. Suppose the case of a receiver proceeding to collect stock liability created after the passage of the act of January 11, 1899, and, therefore, a case where no question arises as to the validity of the law. Now suppose that a receiver should commence an action against a stockholder who is liable for $60,200, but should only ask judgment for $16,000, is it possible that the complaint would be demurrable? Is it possible that the defendants would successfully contend that no recovery could be had because the receiver did not choose to ask a recovery to the full amount of the liability? It is confidently affirmed that before such a construction would be placed upon the statute the meaning would have to be expressed therein so clearly and beyond all doubt as to leave no possibility for any other construction. And we submit that no such construction can be placed on the act of January 11, 1899.

(d) The Act Should be Enforced as Far as Possible.

Assuming, for the sake of the discussion, that the liabilities of the Inter-State Loan and Trust Company are less

than the liabilities of the defendant, and assuming that the act requires and does not merely permit a full recovery, and assuming that the act is therefore in part invalid, under the constitution of the United States, it would still be the duty of the court to enforce the act as far as possible, and render judgment for such sum as would not deprive the defendant of any of his rights under the constitution of the United States.

An act unconstitutional in part will be enforced as far as possible.

"Where a part of a statute is unconstitutional, that fact does not authorize the court to declare the remainder void also, unless all of the provisions are connected in subject-matter depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other."

Cooley, Const. Lim. (6th Ed.), 210, 211.

Can it be said that the legislature of Kansas would not have passed the act in question had it contemplated an effort on the part of receiver to collect less than the whole amount of the liability of the stockholder? To so interpret the statute would certainly be to ascribe a manifest absurdity to the intention of the law-making body.

"A legislative act may be entirely valid as to some classes of cases and clearly void as to others. In any such case the constitutional law must operate as far as it can."

Cooley, Const. Lim. (6th Ed.), 213.

"If there are any exceptions to this rule, they must be in cases only where it is evident from a contemplation of the statute and of the purpose to be accomplished by it that it would not have passed at all except as an entirety, and

that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others."

Cooley, Const. Lim. (6th Ed.), 214.

The general purpose of the act of January 11, 1899, was to transfer the collection of the stockholders' liability from individual creditors to the receiver, and to divide collections more equally and equitably among the creditors.

How can it be said that the general purpose of the legislature will be defeated by collecting $16,000 instead of $60,200?

An interesting case in point on the question of partial unconstitutionality is that of Keokuk Company v. The City of Keokuk, 95 U. S. 80. In this case, the city of Keokuk, Iowa, passed an ordinance providing that all grounds then lying, or which might thereafter be made, between Water Street in said city and the middle of the channel of the Mississippi River should be declared a wharf. And the ordinance further imposed, or attempted to impose, certain fees for all vessels anchoring within the designated territory. This was indisputably and concededly unconstitutional in so far as it attempted to impose any duty of tonnage for the mere right of entering the port of Keokuk, it being a violation of that provision of the tenth section of the first article of the constitution of the United States which provides that—

"No state shall, without the consent of congress, lay any duty of tonnage."

It was held by the Supreme Court in this case that in

so far as the ordinance imposed charges for the use of a valuable wharf actually constructed by the city, it was valid. As to the duty of the court called upon to enforce a law partially unconstitutional, the Supreme Court says:

"Statutes that are constitutional in part only will be upheld as far as they are not in conflict with the constitution, provided the allowed and prohibited parts are separable. We think a severance is possible in this case. It may be conceded that the ordinance is too broad, and some of its provisions are unwarranted. When these provisions are attempted to be enforced a different question may be presented."

Keokuk Co. v. City of Keokuk, 95 U. S. 80.

Here is a case where the constitutional and unconstitutional parts of the act are not only contained in the same section, but in the same sentence. The act was constitutional according to distance and amount, as it were. That is, it was constitutional down to a certain point on the river bank, and further on it was unconstitutional. So in this case, if it becomes necessary to uphold the constitutionality of the act in question, it may be deemed to be constitutional up to the amount of the debts of the company, although it should be held to be unconstitutional beyond that sum.

Payment to the Receiver Would Fully Protect the Stockholder from Further Attack.

If a recovery is had in this case, and if the defendant pays to the receiver, will he thereby be protected from further attack at the suit of individual creditors? If he

will not; if he might still be compelled to pay the same sum upon the same liability a second time, it is clear that he may justly complain that his rights are being impaired.

Under the old law, if a stockholder voluntarily paid any *bona fide* creditors the amount of his liability, he thereby became relieved from any further liability to any other creditor.

"A stockholder in an insolvent corporation against which judgment has been rendered may voluntarily discharge his statutory liability to his creditors by making payment to one of them without awaiting the issue and return of an execution *nulla bona* and the making of an order to enforce his liability; and if such voluntary payment is made in good faith it will operate as a bar to proceedings by other creditors to compel payment a second time."

Bank v. Milling Co., 59 Kan. 654.

Now, the receiver in this case is the statutory agent for all of the creditors, and it is clear that a voluntary payment to the statutory agent of all of the creditors, to be distributed among all of the creditors, would relieve the stockholder from any further liability. If such voluntary payment would relieve him from liability, an involuntary payment would have like effect, and for a greater reason. It is manifestly more equitable that the liability should be collected by the receiver for the benefit of all of the creditors than the grab game which existed under the old law where the swiftest creditor who, by hook or crook, first filed his action, thereby appropriated the entire liability, to the exclusion of all other creditors. Surely the legislature has power to create a statutory agent for the more

equitable distribution of this fund, and when payment is made to such statutory agent, either voluntarily or involuntarily, the individual creditor who has failed to commence any action until after such payment is made, surely has no right to complain and no right of his has been invaded under the constitution of the United States, though Woodworth v. Bowles (61 Kan. 559) shall be approved by this court.

We respectfully submit that if a recovery in this case be had for the same sum and no more than the defendant was liable for under the old law, he is in no wise injured; that no possible right under the federal constitution has been impaired, and that the first two questions propounded by the court should be answered in the negative.

Question III.

MAY A RECEIVER MAINTAIN AN ACTION IN A JURISDICTION OTHER THAN THAT IN WHICH HE WAS APPOINTED?

The following cases in point have passed through this court without serious question:

Hawkins v. Glenn, 131 U. S. 319;
Glenn v. Liggett, 135 U. S. 533;
Glenn v. Marbury, 145 U. S. 499;
The Great Western Telegraph Co. v. Purdy, 162 U. S. 329;
First National Bank of Concord v. Hawkins, 174 U. S. 364.

The rule is thus stated by Smith on Receivers, the latest and best work on receivers:

"The great weight of authority in this country at the present time may be stated in general terms as follows:

. . . . . .

"He (a foreign receiver) will be permitted to sue and defend as a foreign receiver in all courts of other States than that in which he was appointed, on the principle of comity, except where the rights of citizens of the State of the forum are prejudiced thereby, or where it would be in contravention of the policy of such State."

Smith Rec., p. 167.

Booth v. Clark, 17 How. 322, in so far as it can be construed as limiting the right of the receiver to sue in a foreign jurisdiction, has for a long time been undergoing a process of being overruled by being "distinguished." It is manifestly out of harmony with the ever-increasing tendency to bind the States together into one harmonious union. The business relations between the citizens and institutions of the several States are so intimate that to deprive those competent to sue in one jurisdiction from suing in another without special reasons is manifestly absurd and out of harmony with the trend of events. We desire to direct special attention on this point to the following cases:

Howarth v. Angle, 162 N. Y. 179;
Howarth v. Ellwanger, 86 Fed. Rep. 54;
Howarth v. Lombard, 175 Mass. 570;
Relfe v. Rundel, 103 U. S. 222;
26 L. Ed. 337;
Hale v. Harden, 95 Fed. Rep. 747, *771–6.*

See, also, to the same effect—

Runk v. St. John, 29 Barber, 585;
Pew v. Hurtt, 52 How. Pr. 22;
Stoddard v. Lum, 159 N. Y. 265;
45 L. R. A. 551;

Winans v. Gibbs, 48 Kan. 770, *780;*
Robertson v. Stead, 135 Mo. 139;
36 S. W. Rep. 610;
Castleton v. Templeton, 87 Md. 546;
Hurd v. City of Elizabeth, 41 N. J. L. 2;
Swing v. Mentley, 45 W. Va. 283;
Bank v. McLeod, 46 Ohio St. 174;
Metzner v. Bauer, 98 Ind. 425;
Boulware v. Davis, 99 Ala. 214;
Ins. Co. v. Wright, 55 Vt. 526;
Weil v. Bk., 76 Mo. App. 34;
Hale v. Tyler, 104 Fed. Rep. 757;
Small v. Smith, (S. Dak.) 86 N. W. 649.

The stinging commemt of Mr. Thompson, in his work on corporations, directed against one of the cases denying a right to sue, we think is fully justified. He says:

"The reading of such a decision makes one's blood tingle, and almost forces the wish that the Civil War had resulted in sponging out State lines and abolishing the tribal theory of our government entirely."

6 Thomp. Corp., bottom p. 5844.

Booth v. Clarke, 17 How. 322, Considered.

This case is of very doubtful application to the case at bar. A number of reasons for the conclusions there reached are discussed at some length, without it being anywhere stated which one is controlling, and it is doubtful if any of such reasons thus discussed have any application to this case.

Much stress is laid upon the laches of the receiver in commencing his action in the District of Columbia:

"The matter was allowed to rest for seven years, Camara being aware that Clark had a pecuniary claim upon the

Republic of Mexico, at least as early as in the year 1843. The receiver during all this time took no action."

And further on in the opinion the court says:

"There was a want of vigilance in this matter, which does not make any equity which he may have in New York upon Clark's property superior to that of Clark's creditors who are pursuing the funds in this district."

This reason, of course, can have no application to the case at bar.

Furthermore, it appears from the quotation just made that there was a question of conflict between the several creditors of Clark, and a question of priority between creditors, which raised a question of superior equities. In stating the point to be decided, the court said:

"In other words, as an officer of the Court of Chancery for a particular purpose, will he be recognized as such by a foreign judicial tribunal and be allowed to take from the latter a fund belonging to a debtor for its application to the payment of a particular creditor within the jurisdiction of the receiver's appointment, there being other creditors in the jurisdiction in which he now sues contesting his right to do so? Or, can he as a receiver claim, in virtue of a decree upon a creditor's bill given in one jurisdiction, a right to have the judgment upon which the creditor's bill was brought paid out of a fund of a bankrupt debtor in a foreign jurisdiction because his appointment precedes the bankrupt petition?"

It thus appears that the rights of the creditors of Clark in the District of Columbia were largely controlling. Of course this reason can have no application to the case at bar, because under the statute under which this action is maintained the receiver is the statutory agent for all the

creditors, and the only person authorized to sue. If he cannot maintain an action in a foreign jurisdiction, the stockholder's liability is destroyed by indirection; there is a simple denial of justice. Under modern economic conditions it rarely occurs that any considerable number of the stockholders of a corporation reside in its domicile. And if the general rule is to prevail that a receiver cannot sue under the act in question outside of Kansas, the stockholder liability is practically wiped out.

Another question considered by the court with great care was, whether or not the laws of New York intended to confer upon receivers, in case of creditor's bill, authority to sue in a foreign jurisdiction, and the court reaches the conclusion that it was not so intended.

"Whatever may be the receiver's rights under a creditor's bill to the possession of property of the debtor in the State of New York, or the permission that may be given to him to sue for such property, we understand the decisions of that State as confining his action to the State of New York."

Of course, if, under the laws and practice of New York, he was not intended to be clothed with authority to sue in the District of Columbia, it is quite clear that he could not maintain the action.

It is apparent, however, in the case at bar, that the statute of Kansas in question intended to confer upon the receiver authority to sue stockholders wherever found, whether within or without the state. "Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscription of the stock of such

corporation, together with the additional liability of such stockholder." (Sec. 14 of the act in question.

In this respect the case at bar is much more nearly parallel to the case of Relf v. Rundall (105 U. S. 222) than Booth v. Clark. In the former case it was said:

"Relf is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the State and as such represents the State in its sovereignty while performing its public duties connected with the winding up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was in fact the corporation itself for all the purposes of winding up its affairs."

This might be paraphrased to apply to the case at bar as follows:

"While Evans is an officer of the United States Circuit Court for the district of Kansas, he is yet, nevertheless, the person designated by law to take the fund created by the stockholders' liability of an insolvent corporation and hold and dispose of it in trust for the use and benefit of creditors and other parties interested. The law which clothed him

with this trust is, in legal effect, part of the charter of the corporation, inasmuch as section 1 of article 12 of the constitution of the State of Kansas reserved to the legislature the power at any time to amend or repeal charters. He was the statutory successor of the corporation for the purpose of winding up its affairs, including the collecting and distributing of the stockholder's liability. He is the trustee of an express trust, with all the rights which properly belong to such a position. His authority does not come from the decree of the court but from the statute. He appeared in New York not by virtue of any appointment of the court, but as the statutory successor of a corporation."

In the case under consideration a narrower view is probably taken of the extent of the doctrine of comity than now prevails. Whether this narrow view was justified by the peculiar facts of that case, it is not necessary to discuss at length, but certain it is that a very liberal rule now prevails in this court as to the scope and extent of the doctrine of comity in proceedings to enforce contractual liabilities. (Whitman v. The Bank, 176 U. S. 559.)

That the courts respond, and properly so, to changing social and economic conditions, is an indisputable fact; and nowhere is it better illustrated than in the discussion of the question now under consideration. To deny the right of the receiver to sue in a foreign jurisdiction fifty years ago would not to any marked extent have impeded the orderly administration of justice. To-day it is quite the reverse. In the language of the Court of Appeals of New York—

"There is a close business connection between the citi-

zens of the different States of the Union. Investments are freely made in other States by the citizens of this State who need the aid of the court of the jurisdiction where the investments were made. The comity which we expect to have extended to citizens of our State we cannot in justice refuse to citizens of other States. State lines should not prevent justice from being done. Our courts should not close their doors to a receiver from another State who comes here armed with the title to a just claim against the citizens of this State, and offers to establish by common-law evidence the liability of that citizen."

Howarth v. Angle, 162 N. Y. 179, *192*.

This language is especially forcible when we bear in mind that the question there under consideration was in all respects identical with the question here under consideration, and that it is the opinion of the court of last resort in the State from which this case comes; that to establish a contrary rule in this court for the guidance of the federal courts in New York would be to produce a direct conflict between the two classes of courts in that State. Furthermore, great stress was laid in Booth v. Clark upon the authority of certain New York cases which were deemed to be applicable to the right of a receiver to sue in that case under the peculiar circumstances of that case.

Another case illustrative of the modern tendency to a liberal rule, and one which should have great weight with the court, is Howarth v. Lombard, 175 Mass. 570. This case is also in all respects directly in point. The court says:

"In the present case the receiver is called by the court in Washington a *quasi* assignee for creditors. He is

charged with the administration of a trust fund, which does not take form or come into actual existence until after his appointment, and he is the only person who can collect it. By virtue of his official relation to the corporation and its creditors he is the owner of the legal title to this fund as a trustee for creditors. A suit could not have been brought in the name of the corporation, and he is the only person who can now or who ever could legally demand and collect the money."

The most recent case by a State court is Small v. Smith (South Dakota), 86 N. W. Rep. 649, in which it is held:

"The receiver of a foreign corporation appointed by the courts of a foreign jurisdiction is entitled to maintain an action for the recovery of realty in the possession of a resident of the State where no rights of resident creditors intervene."

Question III should be answered in the affirmative.

COMMENTS ON BRIEF OF DEFENDANT IN ERROR.

We respectfully submit, that the first ten and one-half pages of the brief of defendant in error are devoted to the discussion of questions not propounded by the Circuit Court of Appeals. This court is not asked to give any opinion as to whether or not the maintenance of this action would cause the act in question to operate retrospectively, and, if so, whether the act does in fact so operate. If the contention of defendant in error is correct, that this act by its very terms was not intended to and does not apply to the class of cases to which the case at bar belongs, then it is manifest that the act is not unconstitutional in this case nor as to this defendant; and for this reason alone the first

question must be answered in the affirmative and the second in the negative. This but serves to illustrate and demonstrate that the Court of Appeals is not asking the opinion of this court upon the questions discussed under "Point 1" in defendant's brief.

Defendant in error says:

"The constitutional validity of a law is to be tested not by what has been done under it, but by what may by its authority be rightfully done under it."

What application this proposition has to the case at bar is not indicated, but we infer that he would say that the application is as follows: "I might have a defense if sued by the individual stockholder. The validity of the law is to be determined not by what is in fact true, but what might be true; therefore the law in question should be declared invalid as to me in this case."

Now this is an entirely erroneous conclusion. In support of the proposition, counsel cites Montana Co. v. Mining Co., 752 U. S. 160, *170*, in which somewhat similar language is used by this court in commenting upon the contention of one of the parties; but no application is made of the rule, and the comment simply refers to the opinion in Stewart v. Palmer, 74 N. Y. 183, *188*, and by referring to this case we find the meaning and limits of the rule announced. The legislature of New York had authorized certain special assessments *without notice*. The assessments were made without, in fact, any notice being given. The validity of the law was attacked. It was contended in defense of the law, among other things, that the assessment

had been reasonable and just, therefore the law should not be declared invalid. The count said, and very properly, that the law being invalid upon its face for want of notice was void, and that too, irrespective of the question as to whether or not the particular assessment in the particular case had been reasonable or not. Of course, if a law is void upon its face, it is void, and that is the end of the matter; but if the law is valid upon its face, but may be invalid in its operation as to a certain person under certain circumstances, the person averring such invalidity must allege and prove the facts which render it invalid as to him in that particular case.

We would further respectfully call the attention of the court to the manifold contradictions in defendant's brief. It is many times impossible to ascertain what his contention is: For example, near the bottom of page 6 of his brief, and in a number of other places, he contends that it is the intent of the act in question to make him liable only for his proportionate share of the liabilities: "This defendant can only be called upon to pay so much of $60,200 as may be necessary to satisfy his proportionate share of the corporate dues." (Defendant's brief, bottom page 6.)

But on page 15 and elsewhere in the brief he contends with great emphasis that the act in question not only authorizes but "*requires* the receiver to collect the whole $60,200, although the corporate dues may not amount to $1000." (Defendant's brief, page 15.)

On page 9 he contends that the act is invalid (although

no such question is propounded by the court) because there is no provision for notice to the stockholders of the appointment of the receiver; yet, at the bottom of page 6 and top of page 7 he concedes that a proceeding against the corporation binds the stockholder, and he might have cited with great propriety in support of this view —

Hawkins v. Glenn, 134 U. S. 319;
Sanger v. Uptown, 91 U. S. 56;
Glenn v. Liggett, 135 U. S. 533; and
Ball v. Reese, 58 Kan. 614.

On page 9, the defendant contends that "the costs and expenses of winding up the affairs of the corporation *may be* legitimately regarded as corporate dues." Well, if such costs and expenses are corporate dues within the meaning of the constitution of Kansas, how can the defendant complain if he is called upon to pay them, although, as a matter of fact, in this case, he is not and will not be called upon to pay them? However, near the bottom of page 14, he contends, on the authority of the case of Richmondy v. Irons, 121 U. S. 64, that the costs and expenses of receivership are "not a debt due from the corporation or from the stockholders."

At the bottom of page 7 of defendant's brief, and elsewhere, he contends that a proceeding in Kansas in which the amount of the liability of the corporation is ascertained and the proportionate share of each stockholder is indispensable to the maintenance of an action of this kind. Yet it is contended on page 15 that the act in question peremptorily required the collection of the entire stock liability

irrespective of the amount of the liability and irrespective of the proportionate share of each stockholder. What office such an adjudication could perform under these circumstances we cannot imagine.

On page 13 of the defendant's brief it is stated: "Plaintiff in error insists that the repeal of the old statute is ineffective as against Crissey, a judgment creditor, but that it is effective as to this defendant." Now, this is not a correct statement of the position of plaintiff in error. Plaintiff in error contends that the act is effective as to to Crissey, but even if it is not, his rights under the old act are all preserved by permitting him to take his chances with the receiver, and if the receiver sues first he has lost his rights under the old act. That his right under the old act was a right of diligence only.

On the same page of the brief it is contended: "The question whether or not the defendant can urge the invalidity of the legislation is not before this court at this time." In this the defendant in error is mistaken. The question of the Court of Appeals is: "Do sections 14 and 15 aforesaid contravene the constitution of the United States by impairing the contractual liability of the *defendant* previously existing as a stockholder of a corporation of the State of Kansas?" In other words, is the act unconstitutional as to the *defendant?* Are the *defendant's* constitutional rights impaired? The Court of Appeals is not asking whether the act is or might be unconstitutional as to John Doe or some other person in some other lawsuit,

but whether it is constitutional as to Andrew J. Nellis in this lawsuit.

Some stress is laid upon the fact that the receiver was appointed before the act was passed, but it is to be observed that the receiver was appointed exactly in the manner and under the circumstances indicated in the statute. That the passage of the law was brought to the attention of the court appointing the receiver, and "an order was duly given and made in and by said Circuit Court of the United States for the District of Kansas, First Division, by which order it was considered, adjudged, ordered and decreed that said John H. Evans, as receiver, proceed against all or any of the stockholders," etc.

It certainly would have been an idle formality to have the receiver reappointed after the passage of the act.

It is contended that there was no sufficient order of the court appointing the receiver authorizing him to sue, but no order was necessary; his powers flow from the statute, and the order was obtained in this case only because the receiver had been appointed prior to the passage of the act and to the end that the receiver might be advised whether the Circuit Court deemed it his duty to proceed under the new act.

The authorities cited on page 19 of defendant's brief not only wholly fail to sustain the contention there made but strongly tend to sustain the contention of plaintiff on several points. Thus in Swing v. Lumber Co. (91 Wis. 517, *522*) it is said:

"The rule is quite general that he may not sue without first having obtained in some form leave of the court *unless authorized by the statute to bring actions.* Where the right of such an officer does not rest merely upon his appointment by the court of another State, but there has been an assignment to him, in his official capacity, of the property in question, or *by virtue of the statute of such State* the title to the property is vested in him, *he may, it seems, sue and recover the same, not strictly by virtue of his appointment but by reason of title, he being considered for that purpose substantially an assignee.*"

We respectfully submit that questions one and three should be answered in the affirmative, and question two in the negative.

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